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No. 06-889

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

vs.

JAMES ALLEN CODDINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

REPLY BRIEF

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REPLY BRIEF

Coddington contends, without explanation, that the third question presented in the State of Oklahoma's petition for writ of certiorari "was not raised before the state appellate court as it is raised here. As such, it should not be reviewed by this Court." Response at 13.[1] Coddington's failure to explain this cursory statement only confirms that the question was raised. So does the record. In support of his challenge on direct appeal to the impeachment instruction, Coddington argued that *Lockett v. Ohio*, 438 U.S. 586 (1978), "held that a capital sentencing jury cannot be precluded from considering and giving effect to mitigating evidence" and, citing *Penry v. Lynaugh*, 532 U.S. 782 (2001) (*Penry II*), that "[l]ater, the [Supreme] Court re-emphasized that jury instructions must give full effect to mitigating evidence in order to comport with the Eighth Amendment." Opening Brief of Appellant at 62, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (No. D-2003-887). Coddington also argued that exclusion of the videotape of his mother's testimony deprived him of a reliable capital sentencing proceeding because his jury was precluded from considering all aspects of his mitigating evidence, specifically, the emotional reaction the jury might have when watching the videotape. *Id.* at 42-44 (citing *Lockett*, *supra*; *Mills v. Maryland*, 486 U.S. 367 (1988); *Booth v. Maryland*, 482 U.S. 496 (1987); *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Furman v. Georgia*, 408 U.S. 238 (1972)).

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[1] Coddington does not dispute that the first and second questions presented by the State's petition for writ of certiorari were raised below.

Hence, Coddington's challenges below raised the third question presented in the instant petition for certiorari. In *Penry II*, this Court expressly cited Justice O'Connor's statement in dissent in *Johnson v. Texas*, 509 U.S. 350 (1993), that "[a] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances" to support the holding. *Penry II*, 532 U.S. at 797 (citing *Johnson*, 509 U.S. at 381 (O'Connor, J., dissenting) (emphasis in original)). All of the cases cited by Coddington and the Oklahoma Court of Criminal Appeals (OCCA) are grounded on the reliability requirement for capital sentencing decisions imposed generally by this Court's Eighth Amendment jurisprudence. *See, e.g.*, *Penry II*, 532 U.S. at 797. And the OCCA's decision is based on an interpretation of *Lockett* that requires capital sentencing juries to be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant – a concept directly at odds with the pronouncement in *Johnson*, 509 U.S. at 372, and *Graham v. Collins*, 506 U.S. 461, 475 (1993). Further, the State relied below upon the very argument from *Saffle v. Parks*, 494 U.S. 484, 490 (1990), that was quoted in *Johnson* to support the proposition that a jury need not be required to give effect to mitigating evidence in every conceivable manner. Petition for Rehearing at 3-4, *Coddington v. State*, 2006 OK CR 34, 142 P.3d 437 (No. D-2003-887); *Johnson*, 509 U.S. at 372-73 (quoting *Saffle*, 494 U.S. at 490) ("[t]he fundamental flaw in petitioner's position is its failure to recognize that '[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision' "). The third question presented in the instant petition was therefore raised below.

Coddington's complaint that the OCCA did little more than apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), in granting relief – and therefore any references to *Lockett* and the other Eighth Amendment cases are dicta – lacks merit. "Only a concept of dictum that includes the very reasoning of the opinion could support this characterization." *Rogers v. Tennessee*, 532 U.S. 451, 469 (2001) (Scalia, J., dissenting). First, the OCCA did not cite to *Chapman*, let alone reference the *Chapman* harmless error standard (i.e., whether the error was harmless beyond a reasonable doubt, *Chapman*, 386 U.S. at 24) in any portion of its opinion addressing sentencing stage issues. App. 36-50. This is significant considering that the OCCA did cite, and expressly apply, *Chapman* in its analysis of guilt-stage errors. App. 23-24.

Second, considering its specific finding that exclusion of the videotape deprived Coddington of a fundamentally fair trial in violation of the Due Process Clause, App. 40, 42-43, the OCCA had no reason to apply *Chapman* for that issue. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (distinguishing harmless error analysis applicable for trial errors denying a defendant the benefit of a specific constitutional right versus errors that so infect the trial with unfairness as to make the resulting conviction a denial of due process). *See also Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Rochin v. California*, 342 U.S. 165, 168-70 (1952). Third, the OCCA's reference to *Lockett* and other cases from this Court's Eighth Amendment jurisprudence in ruling on the videotape issue is consistent with *Green v. Georgia*, 442 U.S. 95, 97 (1979) – cited by the OCCA, App. 42-43 – which relied upon *Lockett* as a basis for finding a Fourteenth Amendment Due Process violation based upon exclusion of mitigating evidence in a capital sentencing

proceeding. *Green*, 442 U.S. at 97. The OCCA's interpretation and application of *Lockett* and this Court's other Eighth Amendment cases is therefore no more dicta than the application of *Lockett* in *Green*. But for the Eighth Amendment significance of testimony from Coddington's mother, there would be no denial of a fair trial under the OCCA's logic.

Fourth, the OCCA expressly cited, and discussed, *Lockett* in ordering relief on the impeachment instruction issue. App. 47-48. While the question of whether error stems from the impeachment instruction is separate from the harmlessness of any such error, *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998), the fact remains that the OCCA did not cite, let alone attempt to apply, *Boyde v. California*, 494 U.S. 370 (1990), an Eighth Amendment case, to ascertain error. Instead, the OCCA found that reversible error stemmed from the impeachment instruction because it "might" have prevented the jury from considering relevant mitigating evidence – hardly a proper analysis under either *Boyde* or *Chapman*. App. 48. Hence, the Eighth Amendment core of both the videotape and instructional issues is unquestionably ripe for review and Coddington's arguments to the contrary represent mere misdirection to compensate for his total failure to counter the State's compelling reasons for granting the writ.

To the extent Coddington claims that the OCCA's decision does not foreclose a modified impeachment instruction being given at re-sentencing, he ignores reality. The OCCA did not provide an alternative instruction in its opinion. Considering both the OCCA's willingness to grant sentencing relief on this issue wholly contrary to this Court's precedent and the fact no objection was registered to the instruction at trial, App. 48, it is likely trial judges

managing clogged dockets will simply refuse to instruct with any form of impeachment instruction where family members with prior felony convictions testify in mitigation. That will be far simpler than attempting to modify the uniform instruction – an action that will create endless litigation on appeal when the defendant finally decides to object to the instruction – and will eliminate the possibility of reversal on Eighth Amendment grounds. Thus, the injustice of this ruling warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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